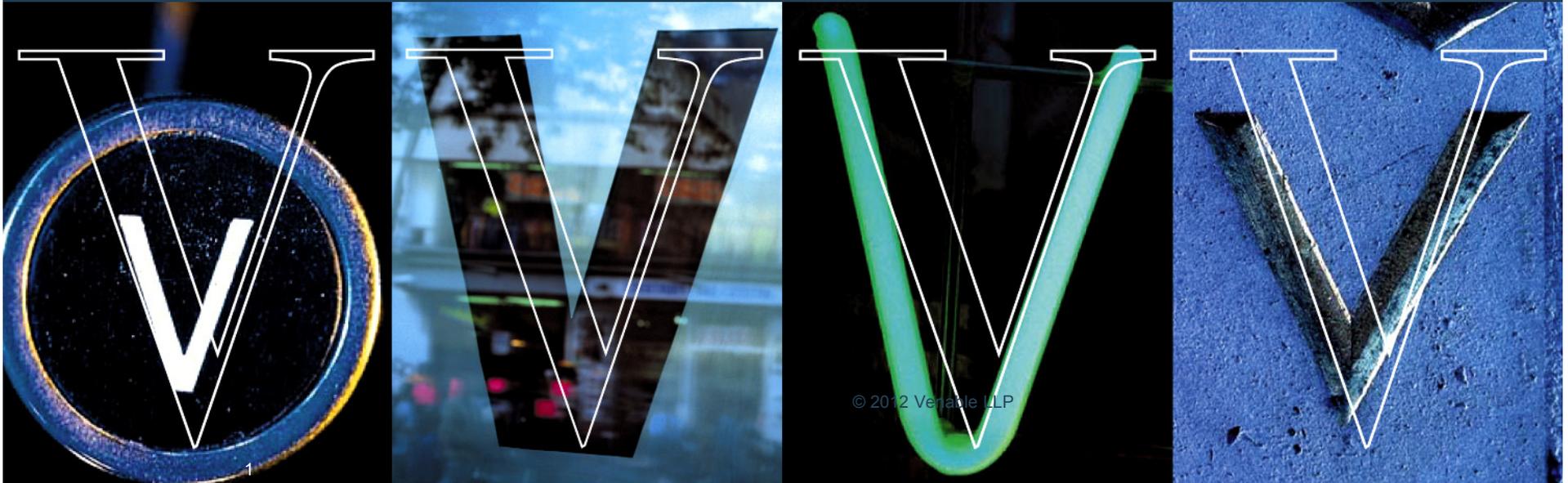


Agreeing to Convene: Spotting and Solving the Most Common Event Contract Pitfalls

Jeffrey S. Tenenbaum, Venable LLP
Lisa M. Hix, Venable LLP
Kristalyn J. Loson, Venable LLP
William G. Karazsia, The National Center for Missing & Exploited Children

June 27, 2012, 12-2 pm ET
Venable LLP
575 7th St NW
Washington, DC



VENABLE[®] LLP

ACC AMERICA
Association of Corporate Counsel
WMACCA Chapter



Jeffrey S. Tenenbaum, Venable LLP

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer and commentator on nonprofit legal matters. Based in the firm's Washington, D.C. office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting trade and professional associations, charities, foundations, think tanks, credit and housing counseling agencies, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was the inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the 2012 *Legal 500* rankings, and was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. He started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill.



VENABLE[®] LLP

ACC AMERICA
Association of Corporate Counsel
WMACCA Chapter



Lisa M. Hix, Venable LLP

Ms. Hix concentrates her practice on counseling charities, trade and professional associations, and other nonprofits on a wide range of legal topics, including tax exemption, intellectual property, corporate governance, and antitrust, among others.

Ms. Hix has broad experience in the nonprofit sector, having served in various capacities at nonprofit organizations, including as the Founding Executive Director of the Memorial Institute for the Prevention of Terrorism (MIPT) and Development Director of East Harlem Block Schools. This experience has included representation before Members of Congress and federal agencies. She also worked in the nonprofit practice of a large national law firm for four years before joining Venable. Ms. Hix is the former Chair of the American Society of Association Executives (ASAE) Washington, DC Legal Symposium, a former member of the ASAE Legal Section Council, and current member of the ASAE Finance and Business Operations Committee.



VENABLE[®]
LLP

ACC AMERICA
Association of Corporate Counsel
WMACCA Chapter



Kristalyn J. Loson, Venable LLP

Kristalyn J. Loson is an Associate in Venable's Regulatory Practice Group. She focuses her practice primarily on nonprofit organizations and associations, assisting charities, trade and professional associations, and other nonprofit organizations on a wide array of legal issues, including incorporation and tax-exemption applications, tax-exemption compliance and IRS audits, corporate governance, membership issues, contracts, and charitable solicitation regulation, among others.

Prior to joining Venable, Ms. Loson served as a *pro bono* staff attorney for the Guardian ad Litem Program, 20th Judicial Circuit of Florida. While earning her law degree, she also completed internships with the U.S. Department of Justice's Civil Division, and the U.S. Attorney's Office. She also served for a year as a judicial intern in the chambers of the Honorable Fern Flanagan Saddler of the Superior Court of the District of Columbia.

Prior to entering law school, Ms. Loson worked as a fundraiser for a large multi-national nonprofit organization. Through her experience in the nonprofit sector, she has gained perspective on the unique needs of these organizations, both legal and otherwise.





Bill Karazsia, The National Center for Missing and Exploited Children

The National Center for Missing and Exploited Children

Counsel

- Commercial Contracts
- Charitable Registration Compliance
- Governance
- 501(c)(3) non-member D.C. corporation

The George Washington University School of Business

Professorial Lecturer of Strategic Management and Public Policy

- Business Law
- Government & Business Relations

WMAACCA

Co-Chair, Non-Profit and Associations Forum



Topics for Today “Agreeing to Convene”

1. **General Negotiation Overview**
2. **Hotel Contract Issues**
3. **Convention Center Contract Issues**
4. **Other Meeting Contracts**
5. **Questions**



Negotiation Overview – A Few Tips

- Your negotiation posture will determine your ability to address the points we will discuss today.
 - Maximize position by **leading with your own contract draft**
 - Know which contract points are central for your organization
 - Competition reaps savings – **consider RFPs**
 - Consider markets, particularly with meeting contracts



Negotiation Overview – Everything is Negotiable

- The big lie – “it’s a standard provision”
- Read everything in the document
- Consider using your organization’s form agreement as the starting point
- Be ready to walk away
- “If you ask for something after a contract is signed, its called *begging*”



Negotiation Overview – Contracting Basics

Remember the “Four Corners Rule”

- Clear & Unambiguous – Contract Speaks for Itself
- Most Litigation Arises Because Contracts Are Unclear
- Otherwise, Most Disputes Are Settled



Hotel Contracts

Provisions to Note:

- Parties
- Rates / Room Block
- Attrition / Cancellation
- Force Majeure
- Warranties
- Indemnification / Insurance



Hotel Contracts *Parties / Effective Date*

- Seems simple, but often overlooked, so **pay attention**



Hotel Contracts *Room Block*

Who has the obligation for room nights?

- Often the parties will understand the relationship to be one in which the organization is not reserving all the rooms set aside, but the plain language of the agreement is contrary to that understanding.
- “...make available for reservation by Group meeting attendees.”
- Clearly list room block size and room rate.
- Include dates/deadlines for room block adjustment – flow down to attrition



Hotel Contracts *Room Rates*

Guarantee the Most Favorable Future Rates

- State that Lowest Room Rate Available
 - Guaranteed Lowest Published Rate
 - Include Internet Sales and Monitor
 - If There Is a Lower Rate:
 - Match for Entire Group
 - Remove Advertisement
 - Remember to link to penalties!



Hotel Contracts *Room Rates*

Setting Future Rates

- Use a formula with several options. State lesser of:
 - Rack rates quoted one year before meeting date
 - Quoted rate plus X% increase per year (2-3% maximum)
 - X% off the lowest published rack rate for the date of the meeting



Hotel Contracts *Attrition*

Tips for Attrition

- *Attrition* – the difference between the actual number of rooms picked up and the number agreed to in contract. Damages assessed based after allowable shortfall (i.e. 90%).
- Many hotels will insist upon attrition language, but moving toward more flexibility.



Consider negotiating a “no attrition/penalties” provision



If not possible, follow steps to mitigate



Hotel Contracts *Damages*

Lessening the Impact of Attrition

- Keep in mind “**duty to make whole**”
- Starting point for negotiations – if one side breaches a contract, then the other side is entitled to damages but not penalties.
- Implement steps to prevent the “Double Dip”



Hotel Contracts *Damages*

5 Steps to Prevent “Double Dip”

1. **Mitigation Clause**: Hotel shall undertake all reasonable efforts to resell canceled rooms, and will credit those revenues against the liquidated damages in an amount not to exceed the full amount of such damages.
2. **Timing of Payment**: Damages, if any, shall be due and payable X days after [original meeting date] provided the Hotel provides proof of its efforts to mitigate damages and proof that rooms being held for Group's attendees were unsold.



Hotel Contracts *Damages*

5 Steps to Prevent “Double Dip”, continued

3. **Exclude Fees/Commissions/Taxes**: Fees, penalties, or liquidated damages, if any, shall exclude service charges, surcharges, and commissions, as well as state and local sales taxes, unless required by law.
4. **Deduct Costs Saved**: If Group is required to pay an attrition fee, the fee shall be calculated by multiplying X% of the Single Room Rate by the difference between the number of actually used rooms and the Room Block Target with credits from guaranteed no-shows, cancellations, and early departure charges, if applicable.
 - ▶ Guest Rooms 70-80%
 - ▶ F & B – 30-40%
5. **Average Occupancy Rate – Not Last Sell**: Group shall not owe any fees, penalties, or liquidated damages if Hotel meets or exceeds its average occupancy level for that particular period of the year.



Hotel Contracts *Damages*

Cancellation Clause Tips

- Include duty to mitigate
- Tie timing of payment to proof of mitigation
- Consider clause giving credit for rescheduled meeting
- Include “Reverse Cancellation”
 - Hotel must pay damages, equal to room rate, for relocation
 - Specify at point, such as 25% of room block, which triggers reverse cancellation damages



VENABLE[®] LLP

ACC AMERICA
Association of Corporate Counsel
WMACCA Chapter

Hotel Contracts *Liability*

- Force Majeure
- Indemnification
- Insurance



Hotel Contracts *Force Majeure*

Force Majeure Considerations

- Standard **force majeure clauses** usually aren't enough.
- Need to tie force majeure to occurrences preventing a substantial amount of attendees to participate and/or get to the meeting site.
- Prefer capturing this in the contract rather than leaving to chance.



Hotel Contracts *Force Majeure*

“The performance of this Agreement by either party is subject to acts of God, war, government regulation, acts of terrorism, disaster, fire, strikes, civil disorder, curtailment of transportation facilities preventing or unreasonably delaying at least 25% of Event attendees and guests from appearing at ABC’s Event, or other similar cause beyond the control of the parties making it inadvisable, illegal, impossible, or commercially impracticable to hold the Event or provide the facility. The contract may be terminated or performance excused by either party without penalty for any one or more reasons by written notice from one party to the other.”



Hotel Contracts *Liability*

Indemnification

Include:

- Reciprocal – each party indemnifies the other for (is responsible for) its own negligence (mutual)
- Limited to Control – what each party is asked to cover is within its control
- Limit Scope to Insurance Coverage
- Include Defense Costs



Hotel Contracts *Liability*

Indemnification

Remove:

- “Sole,” “Gross,” or “As Determined by a Court”
- Coverage of third-party negligence
 - Meeting attendees (except perhaps board members, etc.)



Hotel Contracts *Liability*

How to Manage Liability Assumed

- Flow Down to Third Parties
 - Caterers
 - Transportation
 - Independent Contractors
- Waivers
 - Golf Tournament, etc.
- Insurance
 - Flow this down, too
 - Consider cancellation insurance



Hotel Contracts *Liability*

Warranty

Hotel represents and warrants that the Hotel and Hotel's facilities, including services to be provided by Hotel to Group and its attendees pursuant to this Agreement, and the area surrounding the hotel at the dates herein set forth shall be of substantially the same condition and quality as currently exists as of the date of this Agreement.



Hotel Contracts *Liability*

General Liability Disclaimers

- Not so great for associations
- *“Neither party shall be liable to the other for any special, indirect, incidental, consequential, punitive or exemplary damages, including, but not limited to, lost profits, even if such party has knowledge of the possibility of such damages.”*



Hotel Contracts

Final Hotel Thought - Commissions

- Consider **out-year** consequences
- No **post-termination commissions** (or reduced)
- Have ability to revise relevant agreements **without agent approval**.



Convention Center Agreements

Key Points

- Convention center authorities are notorious for being **intractable on key terms**.
- Still, **persistence and attention** to detail usually pays off.
- Consider an **RFP** as a first step toward getting more favorable terms.



Convention Center Agreements

Are convention centers limited by state or municipal restrictions on matters related to indemnification and liability?

- Don't take their word for it; review the code.
- Consider a catch-all statement obligating the center to indemnify “to the fullest extent permitted by applicable law.”
- If Center is privately owned, push for mutual indemnification



Convention Center Agreements

Insurance - specific provisions

- Waiver of subrogation, duties to provide certificates of insurance and to name the center as additional insureds have significant consequences; consult with broker if necessary and determine additional premiums or other costs that may need to be paid in order to comply.



Convention Center Agreements

Managing risks related to strikes and labor disputes

- Include a provision that your organization can **terminate without liability** if a strike/threat of a strike occurs within six months of the event.
- Require prompt **advance notice**.
- Have the Center warrant that it will provide **replacement workers** if a strike occurs.



Other Meeting Contracts

Other Meeting Contracts – General Considerations

- Watch for subcontractors — destination management companies and transportation companies are notorious for using subcontractors and seeking not to be liable for their negligence.
- Seek contractors with a track record; take due diligence steps to confirm long-term viability



Other Meeting Contracts

Exhibitor Contracts

- Eligibility to exhibit
- Cost/payment schedule
- Cancellation
- Exhibit requirements and restrictions
- Disputes among exhibitors
- Hospitality functions
- Objectionable displays
- Responsibility for exhibitor property



Other Meeting Contracts

Exhibitor Contracts (continued)

- Compliance with laws/Americans with Disabilities Act
- Use of intellectual property/music licensing
- Insurance
- Indemnification
- Exhibitor appointed contractors (EAC)
- Access to attendee list
- Violation of rules
- Provision for government-funded NFPs



Other Meeting Contracts

Speaker Agreements

- Policy/procedure
- Program description
- Compliance with deadlines
- Program review
- Sample Contract
- No promotion or sales
- Cancellation
- License of presentation



Other Meeting Contracts

Speaker Agreements (continued)

- Use a template
- No infringement or defamation
- Ownership of recording
- Travel
- Government-funded NFP provisions
- Indemnification
- Insurance



Other Meeting Contracts

Catering Contracts

- Time to Adjust Menus
- Indemnification
- Define Extra Charges
- Cancellation – incorporate costs saved
 - From “90% of estimated charges including to food and beverage minimum and room rental charge” to “expenses already incurred not legally cancellable without breach at the time of Group’s cancellation and 100% of Lost Profits for the event”
 - Lost profits = F&B minimum minus Caterer’s total expenses attributable to event (including, but not limited to the costs of food, beverage, all taxes thereon, labor) had the event not been canceled and had Client met but not exceeded the food and beverage minimum.



Final Points

- Read everything
- Be willing to walk away



VENABLE[®]_{LLP}

ACC AMERICA
Association of Corporate Counsel
WMACCA Chapter

Questions?



Contact Information:

Jeffrey Tenenbaum
jstenenbaum@Venable.com
t 202.344.8138
Washington, DC

Lisa Hix
lhix@Venable.com
t 202.344.4793
Washington, DC

Kristalyn Loson
kloson@Venable.com
t 202.344.4522
Washington, DC

William G. Karazsia
Counsel, The National Center for Missing and Exploited Children
wkarazsia@ncmec.org
t 703.562.7611

www.Venable.com/nonprofits/publications
www.Venable.com/nonprofits/recordings
www.Venable.com/nonprofits/events

